IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GENERAL LIST

Not Restricted

S ECI 2022 00301

In the matter of:

Anthony Zita (a solicitor)

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	9, 10, 11 May 2022
DATE OF JUDGMENT:	24 June 2022
CASE MAY BE CITED AS:	Re: Zita (a solicitor)
MEDIUM NEUTRAL CITATION:	[2022] VSC 354

LEGAL PRACTITIONERS – Roll of practitioners – Consequence of breach of the overarching obligations to the administration of justice – Whether practitioner a fit and proper person – Whether removal of name required – Significance of mitigating factors – Considerations relevant to imposing suspension from Roll and duration thereof discussed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Dr K Hanscombe QC, with Mr S Warne	JAB Lawyers
For the Contradictor	Mr B Zichy-Woinarski QC, with Mr T Scotter	Victorian Legal Services Board and Commissioner

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HIS HONOUR:

The Application

1 On 11 October 2021, I delivered my judgment on the issues remitted by the Court of Appeal to the Trial Division in *Bolitho v Banksia Securities Ltd* ('**the remitter judgment**').[1] My judgment included, *inter alia*, orders that Mr Anthony Zita, the principal of the firm of solicitors, Portfolio Law, who were the solicitors on record for the plaintiff, Mr Bolitho, pay to the special purpose receiver ('**SPR**') of the rights and entitlements of debenture holders in Banksia Securities Ltd, compensation of $11,700,128, his costs, assessed on an indemnity basis, of the appeal and the remitter and the Contradictor's costs of the remitter, assessed on an indemnity basis.

2 I further ordered (by paragraph 5) that Mr Zita show cause, on a date to be fixed, whether, in the context of the findings expressed in those reasons, he is a fit and proper person to remain on the Roll of persons admitted to the legal profession kept by this court ('**the Roll**'). These reasons deal with this inquiry.

3 Two other matters remained extant after judgment, being a like inquiry concerning the fifth defendant, Mr Alexander Elliott, and an application by the SPR for costs orders against non-parties. As I will later explain, for convenience, given the number of interested parties remaining in the remitter of whom none had any relevant interest in Mr Zita's show cause hearing, I established a separate court file.

4 I have concluded that Mr Zita is not presently a fit and proper person to remain on the Roll. I will order that the registration of his name and other particulars on the Roll be suspended until 30 June 2024. Mr Zita may, subject to satisfying the requirements of the *Legal Profession Uniform Law*,[2] engage in legal practice after 1 July 2024.

Background

5 I assume familiarity with the content of the remitter judgment, particularly for the background circumstances, and I will limit my citation from it to only those parts necessary to understand these reasons. Terms used have the meanings described in

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1 *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666 ('**Remitter judgment**').
2 *Legal Profession Uniform Law Application Act 2014 (Vic)* Sch 1.

the remitter judgment.

6 The findings expressed in the remitter judgment that are referenced by paragraph 5 of the judgment were:

(a) Mr Zita was subject to the overarching obligations imposed by the *Civil Procedure Act 2010* (Vic).[3]

(b) Mr Zita contravened the paramount duty and the overarching obligation not to engage in misleading or deceptive conduct by his conduct in allowing Mark Elliott/AFP to maintain dual interests as funder of and legal representative for the plaintiff.[4]

(c) Mr Zita breached the paramount duty by acting as a post-box solicitor.[5] It is important to appreciate that the expression 'post-box solicitor' is used as a convenient short hand expression to refer to a course of conduct that I will shortly explain, by which Mark Elliott effectively controlled the position of solicitor on the record for the plaintiff.

(d) As a post-box solicitor, Mr Zita did not discharge his duty to the court. His conduct was misleading. He failed to comply with his duty to further the administration of justice. In being complicit in the charade of an independent solicitor for the plaintiff, he was complicit in the corruption of the administration of justice.[6]

(e) Mr Zita contravened the paramount duty by his conduct in connection with the negotiations that led to the Trust Co Settlement deed approved by the court.[7] Although his involvement in these dealings was limited, his conduct maintained the charade, and, significantly, he displayed no insight into the way

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3 Remitter judgment [2021] VSC 666, [1409].
4 Ibid [1444].
5 Ibid [1451], [1453].
6 Ibid [1462].
7 Ibid [1474].

in which the court's ruling in *Bolitho No 4*[8] was being circumvented.[9] He accepted that he abrogated his responsibilities as solicitor for the group. He understood that Portfolio Law's true role was to enable Mark Elliott to continue controlling the litigation, especially the settlement negotiations.

(f) A significant consequence of the breach of paramount duty just described was that Mr Zita failed to identify and properly manage conflicts of interest between AFP and Mr Bolitho/group members that were clearly present at the time of the Trust Co Settlement.

(g) Mr Zita contravened the paramount duty by his conduct in connection with entering into and documenting arrangements in relation to the Lawyer Parties' fees, and in failing to ensure that fees claimed from the Trust Co Settlement sum were properly incurred. His conduct was deceptive or misleading and he failed to ensure that costs were reasonable and proportionate.[10] Such conduct assisted AFP and the Lawyer Parties to recover fees that exceeded a fair and reasonable amount. I will shortly explain Mr Zita's role in the overcharging contraventions.

(h) By his conduct in connection with the Third Trimbos Report, Mr Zita contravened both the overarching obligation not to mislead or deceive and the paramount duty.[11]

(i) Mr Zita misled the court and was complicit in advancing a claim that did not have a proper basis by his involvement in preparing and issuing a summons and notice to group members that stated that AFP was seeking 'reimbursement' of legal costs, when AFP had not in fact paid those legal costs.[12]

(j) Next, Mr Zita misled the court when supporting Mr Bolitho's application for a

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8 *Bolitho v Banksia Securities Ltd (No 4)* [2014] VSC 582.
9 Remitter judgment [2021] VSC 666, [1489] – [1493], [1498].
10 Ibid [1501].
11 Ibid [1531], [1534].
12 Ibid [1553], [1561] – [1564].

settlement distribution scheme.[13]

(k) More significantly, Mr Zita contravened the paramount duty, misled the court and contravened the overarching obligation to only take steps that are reasonably necessary to facilitate the resolution or determination of the proceeding, by his conduct in connection with Mrs Botsman's appeal, about which I say more below.[14]

7 In the remitter judgment I also concluded that Mr Zita contravened the paramount duty by breach of fiduciary obligation in failing in his obligations to manage and avoid conflicts of interest and pursuing his own interests and the interests of the other Lawyer Parties and AFP/Mark Elliott in seeking to secure an excessive funding commission and payments that exceeded fair and reasonable legal costs from the settlement sum, to the detriment of the interests of group members.[15] In respect of that conduct, I said:

> Zita abrogated his duty as solicitor for Mr Bolitho. Not only did he directly engage in breaches of fiduciary duty, but he also knowingly allowed (and even facilitated) breach by others, such as O'Bryan and Symons, of their fiduciary duties, by continuing to acquiesce in Mark Elliott controlling how he acted as solicitor for group members, and concealing this fact of control from the court by remaining as the solicitor of record, as he had since the *Bolitho No 4* decision.[16]

8 In this context, I drew a distinction between findings of dishonesty, such as might constitute a breach of s 17 of the *Civil Procedure Act*, and the concept of equitable fraud in the *Barnes v Addy*[17] sense.[18] The particular findings against Mr Zita in this context are set out below at [19].

9 References to the post-box role refer to conduct in pursuit of the following objective, about which I made findings. Mark Elliott arranged for Mr Bolitho and group members to be represented by Portfolio Law as solicitor on the record expressly for

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13 Ibid [1607] – [1609].
14 Ibid [1612].
15 Ibid [1665].
16 Ibid [1683].
17 (1874) LR 9 Ch App 244.
18 Remitter judgment [2021] VSC 666, [1691].

the purpose of retaining personal control of the position of solicitor on the record for the representative plaintiff. It was necessary to maintain this charade to disguise Mark Elliott's non-compliance with the *Bolitho No 4* decision and to conceal the misleading nature of the representations made to the court and to other parties in the proceedings. Mark Elliott/AFP, O'Bryan, Symons and Mr Zita each intended that Mr Zita only superficially represented the interests of Mr Bolitho, and not in a manner independently of AFP when their interests were in conflict, by permitting Mark Elliott and O'Bryan to control the position of solicitor on the record for the plaintiff despite the *Bolitho No 4* decision. Mr Zita was complicit in this strategy, enabling and advancing its implementation in practice. Mark Elliott and Mr Zita, and others, intended to avoid the transparency and accountability that would come with an independent solicitor.

10 Returning to the overcharging contraventions, Mr Zita contributed to these contraventions by the following conduct. He was engaged on a no win no fee basis, contrary to the terms of his costs agreement. He did not keep contemporaneous records of time spent or work performed, nor issued regular accounts, and he created a spreadsheet purportedly to demonstrate that he had performed valuable work in the proceeding to be relied on by the costs consultant, Mr Trimbos. He did not scrutinise or monitor fees charged by the other Lawyer Parties.[19] Mr Zita conceded that his bills were based on guess work and were wholly unreliable. However, as explained in the remitter judgment, I made no finding that Mr Zita's overcharging was dishonest.

11 In relation to costings, no contemporaneous records were kept and no evidence of work product justifying the amounts claimed was available. Apart from acquiescence in overcharging by O'Bryan and Symons, Mr Zita could not identify a single example of applying independent thought or judgment over the course of the entire retainer. Mr Zita understood that once the court approved the settlement he would be paid money to which the debenture holders were otherwise entitled that exceeded his

[19] Ibid [1505]-[1508].

proper entitlement.[20]

12 My findings as to the manner in which Mr Zita contravened his duties to the proper administration of justice in connection with the preparation of the Third Trimbos Report are set out in the remitter judgment.[21] At trial, Mr Zita contested that he was in breach of these duties.

13 Mr Zita assisted in or encouraged contravening conduct in connection with Mrs Botsman's appeal. The Lawyer Parties waged a campaign of intimidation against Mrs Botsman, who was their own client, having entered into the funding agreement. The Lawyer Parties sought to achieve two purposes, both of which were dishonourable. First, to avoid or minimise the prospect that earlier conduct prior to the institution of the appeal would be discovered by the Court of Appeal and secondly to ensure that the court's approval of AFP's claims would not be set aside or varied to deny the Bolitho legal team their ill-gotten spoils.[22]

14 While this conduct was mostly driven by Mark Elliott and O'Bryan, Mr Zita was aware of it and supported or encouraged it. For present purposes, I repeat what I said in the remitter judgment:

> The integrity of the proper administration of justice is not solely the responsibility of judges, far from it. It is the responsibility of every person to whom the overarching obligations under the *Civil Procedure Act* apply. Judges are not privy to the private communications of legal teams, which are usually privileged. They necessarily rely on officers of the court to protect the integrity of the system.[23]

15 Moreover, for present purposes, the seriousness of the conflict of interest is found, not so much in the fiduciary relationship between a solicitor and a client, as it is in the conflict between the duty owed to the court and the interests of the Lawyer Parties/AFP.[24]

16 I pause to observe that Mr Zita, at trial, contended that a solicitor can defer to the

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20 Ibid [1523]-[1530].
21 Ibid [1534].
22 Ibid [1626].
23 Ibid [1630].
24 Ibid [1631].

advice provided by properly instructed counsel and act in accordance with that advice. While that proposition may be relevant in respect of, for example, a solicitor's duty of care to a client, the obligations imposed by the *Civil Procedure Act* are nondelegable.

17 As I noted earlier I made no finding that Mr Zita breached the overarching obligation to act honestly. However, Mr Zita was concerned that my findings in relation to his obligations under *Barnes v Addy* principles for breach of fiduciary duty might be construed as findings of dishonesty for the purposes of this application. I dispel this notion. I am not considering whether Mr Zita is a fit and proper person by taking the view of his breach of fiduciary duty that it shows he is a dishonest person, because the Contradictor did not make that allegation against him and he was not afforded any opportunity to respond to an allegation of that sort.

18 This inquiry focuses on whether his conduct in breach of his duty to the proper administration of justice, as opposed to any notion of dishonest conduct, demonstrates that Mr Zita is not a fit and proper person to remain on the Roll.

19 My findings in respect of fiduciary duty were a collation of findings about Mr Zita's overall conduct in the proceeding and were that Mr Zita:

(a) permitted himself to be used as a 'post-box', or abrogated to others his duties to his client behind such a façade, particularly in the context where Mr Zita knew that he had been appointed to act following the *Bolitho No 4* decision;

(b) allowed a litigation funder to demand unreasonable conditions from the settlement of group members' claims for its own benefit under threat of damaging the opportunity of group members to compromise the proceeding;

(c) entered into a fee arrangement that involved maintaining no contemporaneous time records and reconstructing bills to support a claim for fees arbitrarily determined by the litigation funder, rather than by reference to work actually performed;

(d) filed an expert report purporting to support a claim for substantial legal costs without reading the report or examining counsel's invoices;

(e) promoted a settlement distribution scheme that he had not read, did not understand, and could not competently undertake, and which sought to impose fees on group members that he had not scrutinised; and

(f) encouraged and supported a litigation funder's campaign of intimidation against a group member (and client) to prevent her from raising, by an appeal, legitimate concerns about claims for costs and funding commission which he knew they had not themselves assessed.[25]

Evidentiary issues

20 Mr Zita objected to the 'admission into evidence' of the remitter judgment. He contended that the remitter judgment and the findings of fact expressed in it were not admissible to prove the existence of those facts on this application. He submitted that this conclusion was required by s 91 of the *Evidence Act 2008* (Vic).

21 To deal with this and other issues, I considered the appointment of a contradictor was appropriate and, with her consent, the Victorian Legal Services Commissioner was appointed as contradictor in the proceeding.

22 Mr Zita further submitted that he should not be bound by every comment, observation, obiter dictum or finding that may have led to a conclusion expressed in section O of the remitter judgment. In support of this submission, Mr Zita filed extensive material by his affidavits of 18 March 2022 and 6 May 2022. Questions arose whether all of this material was admissible. Prior to the hearing, the parties exchanged submissions on whether a preliminary point ought to be determined.

23 I declined to determine, as a preliminary point pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), whether the remitter judgment was admissible or whether parts of Mr Zita's affidavits were inadmissible, on the basis that

[25] Ibid [1693].

it was unnecessary to adopt that procedure. The objections to admissibility of parts of affidavits could be dealt with in the hearing, which is the usual process for taking evidence in a trial. The need for preliminary determination is to be considered with care.[26] I did not accept that there was any utility in the separate proceeding that was proposed. Without advancing the proceeding towards its resolution, it was likely to be productive of delay and additional cost.

24 When at trial Mr Zita objected to the 'admissibility' of the remitter judgment and sought to tender his affidavits, I rejected the submission based on s 91 and permitted the tender of the affidavits, subject to a direction limiting the use to be made of his evidence for the following reasons.

25 Section 91 is inapplicable in the circumstances of this proceeding.

26 The section states:

> 91 **Exclusion of evidence of judgments and convictions**
>
> (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

27 By its text, the section envisages that the question of admissibility is being contested in a proceeding other than that in which the findings of fact were made. That is not this case. As earlier explained, the enquiry reserved by paragraph 5 of the remitter judgment is a continuation of the remitter proceeding in which the court was, on its own motion, examining the conduct in the Bolitho Group proceeding of those who were bound by the overarching obligations. Although the question that was originally remitted by the Court of Appeal addressed the entitlement of AFP to recover from the settlement sum a commission and the plaintiff's costs, the remitter exposed circumstances, as the judgment makes clear, requiring the court to address the further question whether AFP along with the Lawyer Parties, including Mr Zita, was liable to pay compensation to debenture holders pursuant to s 29 of the *Civil Procedure Act* by

[26] See generally the summary of the relevant principles in *Vale v Daumeke* [2015] VSC 342, [31].

reason of breach of overarching obligations.[27] Having made findings that overarching obligations were breached, the present inquiry, again on the court's own motion, was to determine whether particular consequences ought to follow for Mr Zita on those findings. O'Bryan and Symons had earlier consented to orders that they be struck off the Roll.

28 Based on the allocation of a separate court file number, Mr Zita contended that this enquiry was a different proceeding, but that contention was misconceived. The application of a separate file number to this enquiry was not the result of any conduct by any of the parties. No party issued a proceeding. I directed that a separate file number be allocated for administrative convenience, in order to make it clear to the other parties to the remitter proceeding that the issues being considered did not affect their interests. This enquiry is a continuation of the remitter proceeding in order to complete consideration of the issues that properly arose during the course of that proceeding.

29 This inquiry was not a proceeding of the type encompassed by the expression 'that proceeding' in s 91. It was inapt to characterise reference to the remitter judgment as involving a question of its admissibility.

30 I am fortified in this conclusion by the decision of the New South Wales Court of Appeal in *King v Muriniti*,[28] which concerned an application for a wasted costs order against the solicitor for the losing party (who went bankrupt without paying costs orders made against her). In the primary proceeding the bankrupt had made extensive and complex allegations of fraud about which the court found that there was not a 'skerrick of evidence' in support. One issue before the Court of Appeal was whether the court could rely on findings made in the four initial proceedings when determining whether costs should be ordered against the solicitor.

31 The Court of Appeal held that s 91 of the *Evidence Act 1995* (NSW) did not prevent the trial court from having regard to its findings in its principal judgment when exercising

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27 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, 311 [26].
28 (2018) 97 NSWLR 991.

the jurisdiction conferred by statute to order that a legal practitioner is liable for unnecessary costs and that it would be an abuse of process for the solicitor to be allowed to challenge the findings made in the substantive proceedings. Section 91 was not engaged.[29] Basten JA, with Gleeson JA agreeing, stated that s 91 of the Act has no application because the judgment did not need to be tendered for the court to take into account and place reliance on its findings made in the substantive proceeding. The court was entitled to take account of its findings to the extent that they were relevant on the costs question. It was absurd to suggest that it could not have regard to the very judgment in which those findings were expressed.

32 This reasoning must apply *a fortiori* in the present circumstances given that, unlike Mr Muriniti, Mr Zita is a party to the remitter proceeding, was on notice of the precise allegations of breach of overarching obligation that led to the findings at the core of this enquiry, was legally represented, contested the allegations, including by giving evidence and being cross-examined, and made submissions to the court in respect of the factual and legal issues raised by those allegations.

33 Turning next to the issue of the admissibility of Mr Zita's affidavits, particularly those parts of them that reagitated matters on which he did give, or might have given, evidence in the remitter proceeding, I ruled that these affidavits be admitted into evidence subject to a direction under s 136 of the *Evidence Act*. These were my reasons for that ruling.

34 First, I accepted that whether Mr Zita was a fit and proper person to remain on the Roll was to be assessed in the context of all relevant material available when that enquiry was undertaken. In that context, it was open to Mr Zita to confront the findings that had been made, including findings about the evidence upon which my conclusions had been reached. Mr Zita was entitled to explain his state of mind when engaging in the conduct that was found to constitute breach of overarching obligations in order to address the question of his fitness. That said, given the wide ranging nature of Mr Zita's responses in his affidavits to findings of fact made at trial

29 Ibid 1002-3 [44]-[46], [49].

and not appealed, a countervailing principle was that any collateral attack on my findings was impermissible and likely to constitute an abuse of process.

35 It did not appear that any aspect of the evidence that Mr Zita proposed to give by his affidavits was not or could not have been explored at the remitter hearing. It was not relevant that Mr Zita's defence was funded by the Legal Practitioners' Liability Committee ('**LPLC**') and there was no evidence supporting a contention that Mr Zita's legal team did not fully protect his interests in seeking to avoid findings being made against him of such breaches. The findings that are the basis for this inquiry were the basis for the relief sought that compensation be paid under s 29 for which Mr Zita sought indemnity from the LPLC. The question of the fitness and propriety of the Lawyer Parties joined to the remitter proceeding when these allegations were first made, was raised at a very early stage of the proceeding. After hearing the Contradictor's opening address in the remitter, I said:

> The only other matter that I wanted to raise was that, having listened to the opening that I have heard so far and of course it remains to be seen whether any of the allegations that are made by counsel in opening are ultimately established at the end of the day, but I thought I would just let the parties know that in the event that these allegations are established one thing that has troubled me in listening to all of this is the question of whether certain parties are fit and proper persons to remain on the roll of practitioners on this court.
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> I have certain powers in relation to that question both under the court's inherent jurisdiction and under s 23 of the *Legal Profession Uniform Law*. I will, if I remain troubled by this, be inviting the parties to make submissions as to both procedure and substance on that issue at a later point in time. I thought it was only fair to let you all know the tentative way in which I'm thinking so that you can take it into account.

36 In any event, irrespective of this explicit warning, the specific questions of breach of overarching obligation, as I said, were articulated with detailed particulars.

37 There were passages in Mr Zita's affidavits that challenged some of my findings expressed in the remitter judgment, although significant parts of the affidavits were distinctly directed at the question of his fitness to remain on the Roll. It appeared that Mr Zita believed he could use his affidavits to mount a collateral challenge to my findings. In the course of argument, counsel for Mr Zita eschewed the suggestion that

he intended to press a collateral attack on my findings. He sought to tender the evidence only on the question of whether he was a fit and proper person. Identifying whether particular passages in the affidavit were aimed at the former or the latter was like trying to unscramble an egg.

38 In *Sudath v Healthcare Complaints Commission*,[30] criminal charges had been determined in the New South Wales District Court resulting in conviction and disciplinary proceedings followed before a tribunal. The Court of Appeal concluded that the tribunal erred as a matter of law in excluding or limiting the use of evidence sought to be led by the appellant because that evidence would be inconsistent with his conviction for common assault or the evidence or findings referred to in the rulings of the District Court. Meagher JA, in the leading judgment, noted that the appellant was permitted to present relevant and probative material in response to the evidence relied upon by the respondent. This did not mean that the tribunal was required to rehear the matters dealt with in the District Court. The appellant was not using the opportunity to defend the complaints made against him in order to challenge the propriety of his criminal convictions, the fairness of his criminal trial, or in an attempt to relitigate those matters. The tribunal hearing required an assessment of the appellant's character as revealed by alleged personal misconduct. On that enquiry, evidence that challenged the facts underlining the conviction did not, without more, involve re-litigation of the question of whether the appellant was guilty of the offences so as to engage the public policy against collateral attack on a conviction.

39 Section 136 of the *Evidence Act* grants to the court a general discretion to limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party or be misleading or confusing.

40 Being satisfied that there was a danger that a particular use of the evidence was apt to create confusion, and having regard to ss 8 and 9 of the *Civil Procedure Act*, I directed, pursuant to s 136 of the *Evidence Act*, that the use to be made of Mr Zita's affidavits was limited to the question of whether he is presently fit to remain on the Roll and

30 (2012) NSWLR 474.

was not being used, despite any apparent inconsistency, to mount a collateral attack on the findings expressed in the remitter judgment. Because Mr Zita made it clear that he only wished to use the evidence on the question of his fitness to remain on the Roll and that he did not seek to mount any form of collateral challenge to the findings expressed in the remitter judgment, this direction was not, in substance, opposed.

41 Mr Zita also contended that although findings were made in the remitter judgment to the '*Briginshaw* standard',[31] greater caution was necessary in a show cause procedure than was applied when assessing civil compensation. He submitted that because the consequences are more serious, the *Briginshaw* pendulum swings towards greater stringency of fact-finding satisfaction. This submission was misconceived at a number of levels. First, elevation of this procedure over the remitter procedure in order to support this contention cannot be accepted for the reasons already explained – namely, that it would amount to relitigating the factual findings in the remitter. Secondly, the possible consequences following on a finding of breach of overarching obligations were, and were always understood to be, very serious notwithstanding whatever advice Mr Zita thinks he may have received. Thirdly, and as a result of the seriousness of the allegations in the remitter proceedings, the court applied the '*Briginshaw* standard' stringency to its fact finding, and no submission to the contrary was developed by Mr Zita by specific example. The submission is rejected.

Mr Zita's evidence

42 Mr Zita began with an apology to the debenture holders and the families of Peter Trimbos and Mark Elliott for his failure to prevent the shocking events that unfolded on his watch, and his firm's failure to comply with its obligations in relation to legal costs. He said that these events might have been prevented had he:

(a) not agreed to take the case on in the first place as he now recognised he should not have done;

(b) properly understood the limits of permissible control over funded proceedings

31 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

which may be exercised by the funder; and

(c) done his job as solicitor on the record properly and without undue reliance on O'Bryan and Mark Elliott.

He also extended his apology to Mr Pitman, Mrs Botsman and Mr Botsman for failing to prevent, participating in, and on occasions encouraging, the unduly aggressive response of the Bolitho legal team to their objections to the settlement.

43 Mr Zita acknowledged that his knowledge of the specific content of his duties to the court was deficient and stated that he has taken steps to rectify that deficiency, which I refer to below. He acknowledged, with a direct apology to the court, that his breaches of the *Civil Procedure Act* did contribute to the corruption of the administration of justice in the Bolitho proceeding and brought the legal profession, and consequently the administration of justice, into grave disrepute. He acknowledged that his failure to comply with his obligations to the administration of justice by failing independently to discharge his nondelegable duty as the solicitor on the record for the plaintiff was a critical failure on his part.

44 Mr Zita explained his personal circumstances. Although I take those matters into account, it is unnecessary to set out his personal circumstances in these reasons.

45 Mr Zita completed a Bachelor of Laws and was admitted to the Roll in 1986. Over the following years in a general practice he concentrated mostly on personal injuries cases, commercial litigation and property law. His practice became more general when he established his own law firm in 1992. His workload expanded to include criminal law and family law. His commercial litigation practice was predominantly acting for plaintiffs against banks.

46 Initially, Mr Zita deposed that he had an unblemished disciplinary record and had never been under criminal investigation or been convicted of any crime; nor had any finding of professional negligence been made in respect of his work.

47 He acknowledged that this claim was incorrect when the Contradictor drew to the

court's attention that on 9 May 2003 he was found guilty by the Victorian Civil and Administrative Tribunal ('**VCAT**') of failing to respond in a timely fashion to a request for an explanation in the context of a complaint that was, ultimately, not found proved. He explained that he had forgotten about this matter at the time that he made his first affidavit. I am not persuaded that either VCAT's order or Mr Zita's failure to recall it provide relevant assistance on the question before the court.

48 Mr Zita noted that his insurer took over the conduct of the defence, as it was entitled to do, and appointed one of its panel firms to act for him. He contended that he did not appreciate during the remitter that he was at risk of being struck off or that his entitlement to practise was in jeopardy more generally. He asserted that observations that I made during the Contradictor's opening, referred to above, were dismissed by his legal advisors as being limited to the conduct of O'Bryan and Symons.

49 Mr Zita, accepting particular findings in relation to his conduct in the negotiation of the Trust Co Settlement and his failure to pick up the inaccuracies in Mr Trimbos's instructions and in his evidence, admitted that he was lazy and abrogated his duties to the plaintiff. He accepted that it was lazy to rely on his assumptions as to the honesty and motivation of O'Bryan and Symons and that it was quite unsatisfactory for him not to have read counsel's confidential opinion that was proffered to Croft J in support of the reasonableness of the Trust Co Settlement. He expressed his regret for having allowed the funder to control the proceedings to the extent that it did, now appreciating that there are limits in the law as to the permissible degree of funder's involvement in funded litigation.

50 Mr Zita largely accepted my findings about his limited involvement in administering and assessing counsel's fees, but he asserted that while O'Bryan's fees were high, he seemed to hold every detail of the case in his head, was absolutely integral to the success of the claim, and was acknowledged in that way by everybody in the Bolitho team. No bells were heard to ring. Acknowledging that he had no experience of class actions or litigation at this level of complexity and quantum, Mr Zita believed that the funder, as a professional litigator, would have driven the hardest bargain available in

relation to O'Bryan's fees. He accepted, to his great regret, that he missed multiple opportunities to spot aspects of the material presented to the court when the settlement was approved that might have put him on notice that something was amiss.

51 Mr Zita denied that he entered into any express or implied agreement with Mark Elliott that he would charge his fees on a no win no fee basis rather than as required by his costs agreement. However, this denial is inconsistent with findings I have already made when I first rejected that same denial. I also reject Mr Zita's attempt to reframe the evidence given on the remitter about the spreadsheet provided to Mr Trimbos. For present purposes, what is significant is that Mr Zita acknowledged that it is unacceptable for lawyers charging on an hourly basis not to keep time records and that he had done the wrong thing. He contended that because he did not have proper records he believed that he was undercharging rather than advancing a claim for fees which had no proper basis. This position is contradictory. A claim for approval of legal fees by a court that is not supported by proper records is a claim that has no proper basis, when it is asserted that the methodology the solicitor is entitled to use is time cost charging. He has retained the sum of $375,683.30 in his trust account, which is being held pending execution of the judgment against him.

52 I pause to note that there was no evidence that any sum had been paid towards the judgment debt by, or on behalf of, Mr Zita. The debenture holders have his apology but not his money.

53 In expressing his regret that he considered the costs agreement with Mr Bolitho to be something of a formality to which he did not pay much attention, Mr Zita presented a version of events about how his fees were calculated that was properly a matter to be raised, as it was, when he gave evidence at the remitter trial. He sought in this hearing to justify his billing practices by explaining why his time was spread too thin and that he did not have the mental energy to continue to record time and bill the Banksia file regularly. He provided details of extraneous pressures bearing upon him in his affidavits but it is not necessary to recite them. I do not accept this explanation.

54 Mr Zita also sought to explain again the circumstances of receipt and banking of a cheque dated 1 July 2018 in the sum of $377,795.00. This issue was also explored extensively at the remitter and I am not persuaded that any gloss on the findings expressed in the remitter judgment in respect of this issue is warranted in the context of the present application.

55 Next, Mr Zita turned to my findings that he was a post-box solicitor. Apart from noting his concession that he should not have taken on class actions and that he bitterly regrets doing so, he conceded that both Mr Bolitho and Mr Crow may have formed a different view about the settlement if they knew the full story. Mr Zita suggested that Mark Elliott's involvement in the litigation was clearly apparent to the other parties but he appreciated that it would not have been apparent to Robson J and Croft J. He accepted that although his reading of *Bolitho No 4* was rather casual, he understood that both Mark Elliott and O'Bryan were not allowed to act for the group because lawyers are not able to take contingency fees and that having an interest in a litigation funder seeking to take 30% of the proceeds was effectively to take a contingency fee. He believed that it was permissible under the terms of the funding agreement for Mark Elliott to have a high degree of day-to-day involvement, providing strategic advice on litigation management services, but there was a need for someone independent to take on the role of solicitor on the record. He continued:

> I was ignorant of the law in the cases about the degree of control that the law at the time tolerated litigation funders having, never having read a case about class action procedure, never having done a group proceeding before, and never having acted in a matter funded by a litigation funder.

56 Mr Zita stated that his understanding from *Bolitho No 4* and from the terms of the funding agreement itself, was that Mr Bolitho had delegated a great deal of the decision making in relation to the conduct of the proceeding to the funder. He had to obtain a copy of the funding agreement, to which he never became a party, at some later time and he did not see the conflicts management policy or the disclosure statement referenced in the agreement until the remitter trial. He accepted that he did not have a proper understanding of these relationships or that the extent of the involvement of the funder was inappropriate. He did not have a proper appreciation

of the boundary between Mark Elliott exercising a permissible level of control for a funder and becoming the de facto solicitor on the record in the case.

57 Mr Zita acknowledged that he ought to have understood from reading the funding agreement that it was his responsibility to identify instances where instructions from the funder involved a conflict with the interests of Mr Bolitho and group members, particularly in relation to the terms of settlement and issues in relation to the quantum of the commission and legal costs being claimed. He acknowledged that he ought to have given advice in relation to these issues directly to Mr Bolitho. He added that he had not then been equipped to engage in the analysis of what occurred that the court has undertaken because he was not privy to sufficient facts and knew too little of the relevant law.

58 Following the Trust Co Settlement, Mr Zita claimed that he simply understood that a commission was calculated as a percentage of a single settlement sum to be received by either Portfolio Law or the SPRs and distributed to the debenture holders after relevant deductions. He did not tie the question of allocation of the settlement sum to the different proceedings into the calculation of the commission. When Mrs Botsman appealed, Mr Zita did not consider that she was Portfolio Law's client and it did not occur to him that, after the settlement and in relation to the appeal, Portfolio Law was prosecuting the funder's interests which diverged from Mr Bolitho's interests. He stated that his state of mind in relation to Mrs Botsman was heavily influenced by the stated opinions of O'Bryan and Symons and that he did not question their reasoning.

59 Mr Zita said he apologised to Mrs Botsman because he regretted getting caught up in the threats of personal costs orders against her son and regretted having any part to play in the campaign devised by Mark Elliott, O'Bryan and Symons to intimidate Mrs Botsman into not prosecuting her appeal. He now understands their intentions were quite different to what he understood at the time.

60 Mr Zita invited me to accept that he acknowledged he needed to change the way that he had practiced to address his deficiencies. He has undertaken a process of

self-education in relation to ethical issues, and now takes regular file notes on all of his matters that particularly record the time he spent. He manages a much smaller staff and has permanently foresworn any further involvement in class actions. He is prepared to give an undertaking to that effect. He intends to stick to practising in those areas in which he has traditionally practised successfully.

61 Mr Zita invited me to have confidence that he will not fail again to deal adequately with conflicts or engage in unsatisfactory billing practices. He said:

> This case has brought much shame to me and prompted much remorse, given the very substantial financial loss as suffered by the class members in the Bolitho case and it having no doubt contributed to deaths of Mark Elliott and Peter Trimbos. In addition, this has been an incredibly expensive education in these issues for me, and I am now concerned to follow my obligations in relation to billing and costs disclosure, to ensure that I take instructions directly from my client rather than from conflicted agents, and not to rely on counsel in relation to matters which are for the solicitor on the record to be responsible for.

62 Mr Zita invited me to note the following detriments that he has already suffered.

(a) A demand for payment of the judgment debt totalling more than $22 million has not been satisfied as it is a sum that is well beyond the financial resources available to him.

(b) His professional indemnity insurance was limited to $2 million per loss and the LPLC considers that the claims of the debenture holders amounted to one loss. More than $1.5 million of the available cover was paid on defence costs.

(c) The LPLC ceased funding his defence and demanded that he repay its legal costs. He expended substantial sums contesting that decision and the LPLC resumed funding his defence. Notwithstanding that it did so, the demand for repayment remains extant creating the prospect of further expensive litigation and possible expense.

(d) The LPLC has informed Mr Zita that his insurance premiums will be subject to a claims loading.

(e) On 28 January 2022, the Victorian Legal Services Board ('**VLSB**') refused Mr Zita's application for renewal of his 2018-2019 practising certificate and determined that he may not apply for a new practising certificate until 2026. This decision has been challenged and, by agreement, issues in respect of his practising certificate and its renewal have been deferred until the conclusion of this proceeding. In this context, Mr Zita has already paid approximately $100,000 in legal costs with further substantial fees having been incurred but not paid.

(f) Mr Zita is shocked to have been involved in the conduct of Mark Elliott, O'Bryan and Symons to the disadvantage of the group members. The stress of the litigation has been keenly felt and he has been shocked by the findings made against him and the extensive media coverage of the case. His personal reaction has had a profound psychological impact upon him. The coroner's report into the deaths of Peter Trimbos and Mark Elliott significantly distressed him and he has been consumed by guilt. He feels that he has brought shame upon his family and his law practice. He now takes antidepressants and consults a psychologist, Ms Bernadette Healy. I will come to Ms Healy's report to the court shortly.

Character witnesses

63 Mr Zita tendered 11 character references from five barristers, two solicitors and three persons from other areas of his life. Most of these character witnesses had been presented with a summary of the remitter judgment to understand the context in which the reference was sought.

64 Summarised broadly, the character references spoke well of Mr Zita, expressing surprise at the findings made against him and suggesting that he was a competent and honest suburban legal practitioner whom, in that context, they would not hesitate to instruct for their own personal affairs.

65 Two of the referees carefully considered my findings.

66 One barrister described them as significant and damning, noting that although I made no finding of dishonesty against Mr Zita, the finding that he engaged in misleading or deceptive conduct and breached the paramount duty to further the administration of justice by the post-box solicitor role was alarming. He stated that he had spoken to Mr Zita both prior to and after the delivery of the judgment. He knew that the findings had had a devasting effect on Mr Zita and that the only explanation he could proffer was that Mr Zita lacked experience in class actions and trusted those instructing and advising him that no step taken was inimical to the best interests of the clients. The barrister accepted my findings that Mr Zita was the dummy who never stood up to Mark Elliott as incontrovertible and amounting to a serious dereliction of duty. The barrister noted that Mr Zita and his wife contribute considerable financial support to a particular charity and that Mr Zita is generous in waiving his fees for deserving clients whose circumstances have changed. His lack of attention to invoicing and fee rendering – his poor billing practices – have been raised with the barrister by his wife. They have both attempted to encourage Mr Zita to improve these practices. That said, he considered Mr Zita to be an honest and hardworking solicitor, troubled very deeply and affected in his practice by the findings made against him.

67 In March 2022, Ms Healy reported that she had been consulted regularly by Mr Zita in her capacity as a psychologist with particular expertise in counselling members of the legal profession. Initially, she observed symptoms suggesting Mr Zita was experiencing a mental health crisis and referred him urgently to his general practitioner. She did not suggest that these symptoms pre-dated the remitter proceeding.

68 Ms Healy described the focus of her work as management of Mr Zita's psychological distress caused by his involvement in the Banksia litigation that has engendered in him feelings of self-disgust and shame. She identified that this distress was and continues to be due to his appreciation of the fact that he failed to carry out his professional obligations and that this has caused significant harm to many people. She stated:

> In particular, he has faced and continues to face the fact that his approach to work was unbalanced to such an extent that he has become a person with a limited outlook, limited interests and a limited perspective. This narrowing contributed to his failure to appreciate what was really going on in the matter which is the subject of this hearing. Over time he has reduced the likelihood that he would be able to reality check his professional approach because he routinely neglected developing his own personality. This neglect included a failure to appreciate long held patterns such as avoidance and a vulnerability to complying with powerful authority figures. The attributes that will ensure that he does not repeat any of the behaviours that led to his failures in this situation which is the focus of this hearing, are Tony's ability to face his weaknesses and take responsibility for them, his desire to improve, and his increasing ability to seek out and listen to expert advice.

69 It is clear from Ms Healy's report that she is describing an ongoing process in which Mr Zita is receiving significant support from friends and colleagues and that she feels that he is sufficiently motivated and has sufficient potential to act with professional and personal integrity to succeed in taking appropriate responsibility going forward that she was prepared to offer her letter of support.

Contradictor's submissions

70 The Contradictor initially noted that the VLSB had taken a serious view of my findings when responding to Mr Zita's application to renew his practising certificate. The Contradictor reserved the right to take a different position in other proceedings and/or investigations of Mr Zita if necessary but would not otherwise make submissions to me about the way I ought to interpret my findings.

71 The Contradictor noted that Mr Zita's position was not assisted by my finding that AFP and others on the Bolitho legal team were found to have engaged in more egregious conduct than he did. It submitted that it was significant that the relevant conduct occurred over a long period; from December 2014 to November 2019 in the Banksia proceeding, continuing into the remitter proceeding thereafter. Such conduct over an extended period demonstrated a clear lack of insight. I note that Mr Zita accepted this to be so.

72 The Contradictor submitted that the appropriate order was for Mr Zita to be struck from the Roll. That consequence was primarily justified by reference to the reprehensible and depraving quality of Mr Zita's conduct in both the Bolitho

proceeding and the remitter proceeding. That said, the Contradictor acknowledged that Mr Zita lacked the culpability of other members of the Bolitho legal team.

73 The gravamen of *Bolitho No 4* was that the court sought the appointment of an independent solicitor to represent Mr Bolitho and group members. That ought to have been Mr Zita's primary focus. The unusual circumstances in which he was retained by Mark Elliott ought to have put Mr Zita on notice that significant constraints were required on Mark Elliott's position in relation to the affairs of the solicitor on the record for Mr Bolitho and the group members.

74 For nearly five years he held himself out to the court, to his clients, and to other practitioners as an independent solicitor representing Mr Bolitho, that is, independent of AFP/ Mark Elliott, contrary to the facts. By engaging in such conduct, Mr Zita actively undermined the court's reasoning in *Bolitho No 4* and corrupted the proper administration of justice. It was clear, the Contradictor submitted, that Mr Zita failed to identify the need to exercise his own independent judgment when acting in litigation for a party. Relevantly, the conduct that calls into question whether Mr Zita is a fit person to remain on the Roll is purely professional conduct. Many of the cases to which the court has been referred that focus on a practitioner's personal conduct outside of the professional sphere must be read in that context.

75 Significantly, Mr Zita's conduct did not change over the course of the Bolitho proceeding. It was only when his conduct was exposed to critical analysis during the remitter that he began to gain insight into his specific failings and to feel personal consequences. A lack of self-motivation to identify his failings ought to satisfy the court that he is and will remain unfit to remain on the Roll. The evidence demonstrates that while Mr Zita has some insight into his failings in the Bolitho litigation, he clearly still wants to blame others for what happened and his inability to fully accept the significance of his conduct justifies, to a large degree, striking him from the Roll. A good example is found in his reliance upon the conduct of O'Bryan whom he appears to have uncritically held in awe.

76 Given that the findings demonstrated conduct that has corrupted the administration of justice the court ought to very carefully examine Mr Zita's insight into and acknowledgement of his own failings and faults. In that context, Ms Healy's report was unsurprising, being consistent with the court's findings. On the whole of the evidence, the court should conclude that notwithstanding some insight, Mr Zita has been unable to take an objective view of his conduct such that he could persuade the court that he is a changed man. Mr Zita's subjective view of appropriate ethical conduct falls short of enabling an objectively assessed conclusion that he is capable of discharging his responsibilities to the administration of justice. In particular, conduct of a practitioner over a long period of time, such as in the present context, is sufficient to now permit a conclusion that a practitioner is not, and will not into the foreseeable future, be a fit and proper person to remain on the Roll.

Zita's submissions

77 In summary, Mr Zita contended that he was manipulated. He did not submit that he is a blameless victim. Rather, he contended that he never intended that the conduct of Mark Elliott, O'Bryan and Symons would occur, or that *Bolitho No 4* would be circumvented. Mr Zita accepted that he should never have agreed to take on the case, given his inexperience and want of knowledge about class actions, and that, crucially, he will undertake never again to be involved in complex commercial litigation such as the Bolitho class action. That O'Bryan, Symons and Mark Elliott intended to seek a financial advantage to which they were not entitled was a most unforeseen circumstance that prevented a more orthodox client/solicitor/counsel relationship from developing. It was, Mr Zita contended, quite out of character for him to be participating in such an unorthodox approach to litigation.

78 Mr Zita contended that the absence of express findings of dishonesty mean that his case does not fall into the class of case that usually gives rise to striking off in Victoria. He submitted that the court should find that it is unlikely that he will repeat his mistakes and that the court should take into account that the reputation of the profession has already been protected by the severe detriment he suffered consequent upon the remitter judgment, the costs, stress and embarrassment associated with the

Bolitho proceeding, and the related issues that Mr Zita has faced with the LPLC and the VLSB.

79 Mr Zita submitted the court should have regard to a number of consequences that might follow should he become a 'disqualified person' as defined by s 6 of the *Legal Profession Uniform Law*:

(a) If the judgment creditors allow Portfolio Law Pty Ltd to survive at all, its fate and that of its employees appears grim;

(b) Mr Zita is in dispute with the LPLC who have demanded repayment of defence costs incurred in mounting his defence in the remitter and any liability to the debenture holders that is indemnified under the policy;

(c) There are complications arising from events following on the decision of the VLSB not to renew Mr Zita's practising certificate and consequent orders made by VCAT.

80 Mr Zita contended that other matters could be taken into account in his favour.

(a) The fact that the VLSB did not, prior to being appointed by the court as contradictor, recommended to the court that he be struck off;

(b) The fact that he has given a substantial and detailed account of his actions as solicitor on the record.

81 Mr Zita contended that the court ought not attribute the knowledge of the other defendants in the remitter proceeding to him, while accepting that doing so may have been appropriate in the remitter proceeding. An application to remove a legal practitioner from the Roll is strictly personal. It relates to the legal practitioner himself and the question of his fitness to practice.[32]

82 Mr Zita further submitted that denunciation of conduct in order to 'protect the reputation of the profession' may be achieved by a reprimand, particularly where the

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32 *Re A Solicitor* [1960] VR 617, 620.

court is satisfied that recurrence of the conduct is unlikely and protection of the public by removal of the practitioner from the profession of no utility. He submitted that the goal of safeguarding the administration of justice by preserving public confidence in it may be satisfied where, as here, the practitioner has suffered significant detriments.

83 In this context, it may be accepted that a reprimand in itself is a serious sanction for a professional person.[33] Detriments may include expenditure on legal costs and liabilities for the legal costs of others[34] or orders for the payment of compensation.[35] For example, in *Council of NSW Bar Association v EFA ('**EFA**')*,[36] analysed later in these reasons, when confirming the tribunal's disposition, a reprimand and an order to pay the costs of the prosecution, the Court of Appeal held that but for the detriments already suffered by the practitioner, his conduct would have warranted a more penal sanction. Factors taken into account beyond the unlikely prospect of repetition of the conduct, included the castigation of the practitioner in the media, personal consequences and mental suffering, expenditure on legal fees and liability for legal costs, and a significant premium increase for professional indemnity insurance.

84 Mr Zita submitted that there were several reasons why I ought not conclude that, if I am satisfied by reference to the history of the Bolitho proceedings that Mr Zita was not a fit and proper person to remain on the Roll, he will remain so into the foreseeable future.

(a) He accepted responsibility for what went wrong and for his role in it. Ms Healy has vouched for the significance of his insight and his present perception resulting in a change of attitude on Mr Zita's part. Several of the character referees make the same point.

(b) The significance of O'Bryan's former status in the legal profession ought not to be underestimated. It is also clear that many others found Mark Elliott to be a

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33 *Peeke v Medical Board of Victoria* [1994] VSC 7 ('***Peeke***'); *A Practitioner v The Medical Board of Western Australia* [2005] WASC 198, [62] ('***Medical Board WA***').

34 *Environment Protection Authority v Barnes* [2006] NSWCCA 246, [88].

35 *Ha v Pharmacy Board of Victoria* [2002] VSC 322 ('***Ha***'); *PLP v McGarvie* [2014] VSCA 253 ('***McGarvie***'); *Council of the New South Wales Bar Association v EFA (a pseudonym)* (2021) 106 NSWLR 383 ('***EFA***').

36 (2021) 106 NSWLR 383.

manipulative puppeteer who was extremely difficult to deal with. They were able to exploit the deficiency in Mr Zita's personality identified by Ms Healy in her report.

(c) Mr Zita has sought professional advice and counselling, and continues to develop, enabling a finding that he has changed and will continue to do so into the foreseeable future.

85 The law in relation to funders of group proceedings is complex, which Mr Zita acknowledged. His intention to avoid practice by acting in complex litigation mitigates the assessment of whether he will remain unfit to practice into the foreseeable future.

86 The protection of the reputation of the legal profession in its role in contributing to the proper administration of justice has been satisfied to a great degree by the media report of the proceeding. The remitter judgment stands as recognition that the profession is held to the highest standard to protect the public interest. The court has expressed its protective supervision of the administration of justice.

87 Ultimately, Mr Zita submitted that I should neither strike him off the Roll nor take no action. He accepted that there will be consequences.

88 Mr Zita contended that the exercise of the protective jurisdiction did not require that he be removed from the Roll so that he could not repeat his conduct. The court should accept that he will not again breach his duties. If that submission be accepted, the court ought carefully consider whether and if so to what extent punishment beyond a reprimand, by way of denunciation to protect the reputation of the profession, is necessary, in light of the detriments and sanctions which may already have been suffered and imposed as a result of the practitioner's misconduct.

89 He submitted that the period of suspension of four years suggested by the Contradictor was, in the context of his submissions and all of the circumstances, too long. He invited me to consider that if a period of suspension is necessary, I might

then suspend the operation of some or all of that period of suspension, as occurred in *Stirling*,[37] as a more effective sanction for the purpose of protecting the public interest while imposing the least onerous sanction that would achieve that protective purpose.

Legal principles

90 Section 264 of the *Legal Profession Uniform Law* provides that the statute is not intended to limit the broad inherent supervisory jurisdiction of the court. In particular, s 23, while recognising that the court may order the removal of the name and other particulars of a person from the Roll on its own motion, further provides that the court may so order on the recommendation of the VLSB or on the recommendation of the VCAT. It can be said that there is both an inherent, and a complimentary statutory, jurisdiction for the supervision of legal practitioners. I am exercising that broad inherent supervisory jurisdiction.[38] There is no antecedent recommendation from the VLSB or the VCAT.

91 It is convenient to note some of what I said in the remitter judgment[39] concerning the applicable principles.

(a) Before ordering that a person be removed from the Roll, the court must be satisfied that at the time of hearing, they are not a fit and proper person to be a legal practitioner and are likely to remain so for the indefinite future.[40]

(b) Removal of a practitioner from the Roll is not a punitive measure. It operates to protect the public from misconduct by practitioners and to promote community confidence in the proper administration of justice.[41]

(c) In order for a person to be 'fit and proper' to become, or remain, a legal practitioner, they must be honest, independent, able to judge what ethical conduct is required of them, and then be capable of diligently discharging the

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37 *Stirling v Victorian Legal Services Commissioner* [2013] VSCA 374 ('***Stirling***').
38 *Victorian Legal Services Commissioner v Horak* [2016] VSC 780, [5] ('***Horak***').
39 Remitter judgment [2021] VSC 666, [1395] – [1401].
40 *Horak* [2016] VSC 780, [57]. See also *Legal Services Board v McGrath* (2010) 29 VR 325, 329 [11] ('***McGrath***'); *Southern Law Society v Westbrook* (1910) 10 CLR 609, 612.
41 *NSW Bar Association v Evatt* (1968) 117 CLR 177, 183-4; *Victorian Legal Services Board v Gobbo* [2020] VSC 692, [7] ('***Gobbo***').

responsibilities of their office.[42] A legal practitioner must be 'possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public, without further inquiry, as a person to be entrusted with the sort of work which the licence entails.'[43]

(d) Whether a practitioner fails to meet these criteria is a fact-sensitive inquiry.[44] In making this evaluation, the court is required to do more than just consider the practitioner's historical actions.[45] It must also inquire into whether the practitioner has insight into, and fully appreciates, the gravity of his wrongdoing and has demonstrated effective rehabilitation.[46] The court must also consider the connection of the conduct to the practitioner's fitness, which is to say, to what extent the conduct is simply inconsistent with the privileges associated with further practice.[47]

(e) A practitioner will be found unfit to remain on the Roll if:

> [T]hey pose a direct risk to the public, to the legal fraternity, to the courts, to the system of professional co-operation and trust on which they both depend, and to the administration of justice …[48]

(f) As Forbes J recently observed in *Victorian Legal Services Board v Gobbo*:

> Reliance by a court on the integrity of those who are its officers is … fundamental to the proper administration of justice. Repeated breaches in a number of proceedings over such a period of time as is demonstrated by the agreed facts is incapable of being overcome.[49]

92 Since I published the remitter reasons, the New South Wales Court of Appeal in *EFA*[50] examined how the exercise of the jurisdiction has evolved over time. Fitness to remain on the Roll remains the criterion to be applied where the court's inherent jurisdiction is invoked. In *In Re Davis*[51] the High Court noted that a power of removal or

42 *Hughes & Vale Pty Ltd v NSW (No 2)* (1955) 93 CLR 127, 156.
43 *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70, 76.
44 *Gobbo* [2020] VSC 692, [9].
45 Ibid [10].
46 *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253, 275 [37].
47 Ibid 273–4 [33]–[34].
48 *McGrath* (2010) 29 VR 325, 329 [11].
49 [2020] VSC 692, [49].
50 (2001) 106 NSWLR 383.
51 (1947) 75 CLR 409, 414, 419.

suspension is incidental to the power to admit.

93 In the context of Mr Zita's strong submission that having not found that he was dishonest I should not consider removing him from the Roll, what Kitto J said in *Ziems v Prothonotary of the Supreme Court of NSW*, is of particular significance.

> Yet it cannot be that every proof which he may give of human frailty so disqualifies him. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them. It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.[52]

94 The notion of the 'daily co-operation which the satisfactory working of the courts demands' clearly encompasses the legal practitioner's duty to the proper administration of justice, the paramount duty restated in s 16 of the *Civil Procedure Act*. I discussed the content of this duty at length in the remitter reasons.[53] True it is that many practitioners are removed from the Roll for dishonest conduct, but as Kitto J made clear, the circumstances that demonstrate unfitness are neither limited nor easy to constrain by a definition.

95 As the Court of Appeal noted in *EFA*, the *Allinson* formulation[54] – conduct which would be reasonably regarded as disgraceful or dishonourable by professional peers of good repute and competency – is not a distinct category of professional misconduct that is divorced from the 'fit and proper person' concept. That is not to say that the *Allinson* formulation does not play an important part in the application of the critical criterion of fitness. Further, it may be accepted that an adverse finding by the application of the fitness test does not necessarily require removal of the practitioner

52 (1957) 97 CLR 279, 298 (emphasis added).
53 Remitter judgment [2021] VSC 666, [1308] – [1324].
54 See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750.

from the Roll.[55] The Court of Appeal also noted that the test is directed to assessment of the practitioner's character and is not solely limited to the conduct under consideration. Although that conduct may be sufficient to satisfy the test, the court may also take into account other circumstances.[56]

96 Just as the court may when exercising its inherent jurisdiction to admit persons to the Roll do so subject to conditions or upon receiving an undertaking,[57] so in its inherent disciplinary jurisdiction the court has power to suspend a practitioner's registration or to impose a fine.[58] When exercising its inherent jurisdiction, a suspension of practice will not usually refer to a practising certificate, a statutory requirement. Rather, the court will order simply that the practitioner not engage in legal practice for a specified period. Such a condition might also be suspended or partially suspended.[59] Subjecting a practitioner to conditions or an undertaking will most commonly concern how the practitioner is to practice and be best imposed and supervised through the process of practising certificates and their renewal under the *Legal Profession Uniform Law*.

97 However, the protection of the public and the integrity of the administration of justice may result in onerous consequences for the practitioner. What would be considered as mitigating factors in the context of the criminal law may not have that effect when the purpose is protective rather than punitive. The analysis is distinct, concentrating not so much on the culpability of the offender as on the future implications of mitigating factors in the assessment of fitness test.

98 Mr Zita cited *Quinn v Law Institute of Victoria* (***'Quinn'***),[60] where the practitioner was suspended by the tribunal for 12 months for misconduct by charging 'grossly excessive legal costs' and 'wilful or reckless' contravention of the Trust Account Practice Rules. Quinn had been exposed to distressing personal and family strains, and suffered from major depressive episodes. He remained under medical treatment,

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55 *EFA* (2021) 106 NSWLR 383, 411 [151].
56 Ibid 412 [158].
57 *Petsinis v Victorian Legal Services Board* [2016] VSC 389, [95]-[98].
58 *A Solicitor v Council, Law Society of NSW* (2004) 216 CLR 253, 275 [40].
59 *Stirling* [2013] VSCA 374.
60 [2007] 27 VAR 1 (***'Quinn'***).

his condition having deteriorated following the decision of the tribunal. He submitted that suspension of his practising certificate was unnecessary for the protection of the public, given that the overcharging was not the result of concoction or deception, but was the consequence of 'personal failings of a man who was honest, not lacking in probity nor being in the least furtive in his activities'.[61]

99 Maxwell P (Chernov and Nettle JJA agreeing) noted two matters in *Quinn* of present relevance, based on the paramountcy of the protective function of the jurisdiction.

(a) Where there is a choice of sanctions, it is to be expected that the tribunal will, while balancing all relevant considerations,[62] choose that sanction which maximises the protection of the public.[63]

(b) The analogy between the disciplinary jurisdiction and criminal sentencing can be appropriate given the confluence of purpose to protect the public. The existence of any mental condition, either at the time of the offending or at the time of the Tribunal's hearing, or both, may be relevant in assessing the nature of the conduct, issues of culpability, the need for specific deterrence and whether general deterrence was inappropriate in the particular circumstances of the practitioner.[64]

100 In *Burgess v McGarvie*,[65] the practitioner had failed to use best endeavours to complete work as soon as reasonably possible, failed to communicate effectively and promptly with clients, and had failed to honour an undertaking to comply with his continuing professional development obligations. Nettle and Neave JJA accepted that there was force in a submission that the practitioner's personal circumstances (suffering from mild/moderate depression referable to a confluence of personal and professional stressors) were genuinely disabling such that any additional task seemed overwhelming. While accepting that the scale of the applicant's offending seen in light

61 Ibid 7 [26].
62 See also *Burgess v McGarvie* [2013] VSCA 142, [67].
63 *Quinn* [2007] 27 VAR 1, 8 [31].
64 Ibid 8-9 [36]-[38].
65 [2013] VSCA 142.

of his previous offending was such that he should be suspended from practice as a principal solicitor for a significant period, their Honours were not persuaded that there was much to be gained by way of deterrence or community protection, still less by way of rehabilitation, by requiring him to stand out of the profession altogether or be deprived of a livelihood if there were other suitable sanctions.

101 These observations were made in the context of the conduct and personal circumstances of the practitioner in each case. They appear to have more relevant application where the disqualifying conduct is personal rather than professional. Although Quinn's conduct was in a professional context, it was akin to a dishonesty crime being motivated by personal gain. Burgess's conduct was directly influenced by his disabling condition. Mr Zita's circumstances are different and the analogy between the disciplinary jurisdiction and criminal sentencing is not particularly helpful when the core feature of the disqualifying conduct is its impact on the integrity of the administration of justice and the disabling personal characteristics have followed from recognition of the dishonour, rather than as a contribution to the conduct.

102 It has been accepted that a reprimand is itself a serious sanction for a professional person.[66] There are many cases where the object of a sanction has been effectively achieved by the imposition of conditions, particularly when the practitioner has already been subjected to criminal proceedings.[67]

Conclusion

103 The essence of Mr Zita's conduct in the Bolitho proceeding, that goes to the core of the enquiry as to whether he is now and will remain so into the foreseeable future, a fit and proper person to remain on the Roll, is that over an extensive and sustained period, Mr Zita engaged in conduct that corrupted the proper administration of justice, with very serious consequences.

104 The court's focus on the need to protect the integrity of the due administration of justice was evident from the outset. In *Bolitho No 4,* Ferguson JA explicitly identified

66 *Peeke* [1994] VSC 7, 6; *Medical Board WA* [2005] WASC 198, [62].
67 See eg *Ha* [2002] VSC 322, [71]; *McGarvie* [2014] VSCA 253 [75], [76], [92]; *EFA* (2021) 106 NSWLR 383.

that purpose.[68] What my findings in the remitter judgment made clear is that Mr Zita fell well short of meeting the highest standards of integrity that are expected of solicitors in order to ensure the proper functioning of the administration of justice. Those standards require more than honesty, learning the law and forensic ability. A profession in the law is more than a commercial business, the delicate relationship between the conduct of that business and the administration of justice for the benefit of the community carries both exceptional privileges and exceptional obligations.

105 The primary reason why I considered this enquiry necessary was that Mr Zita's breach of his overarching duties, by his role as a post-box solicitor, was prejudicial to the proper administration of justice in a fundamental respect. It was corrupting and dishonourable. While there is no doubt that the primary architects were Mark Elliott and O'Bryan, Mr Zita was a party to a want of candour towards other litigants and their practitioners and towards the court. Most importantly, Mr Zita's conduct materially contributed to the opportunity for AFP, Mark Elliott, O'Bryan and Symons to attempt to dishonestly obtain a financial advantage from the approved settlement to the detriment of defenceless debenture holders. It was an attempt that almost succeeded and the further conduct once Mrs Botsman appealed, to discourage exposure of their conduct, was seriously aggravating . Such a flagrant breach of the paramount duty to the court warrants, *prima facie,* the conclusion that those who participated in it should be struck off.

106 Beyond the seriousness of the conduct in breach, demonstrating an inability to discharge those obligations over a sustained period not only calls into question whether a practitioner is a fit and proper person but requires careful analysis of the prospects of that person meeting the requisite standards in the future. Much of what occurs between legal practitioners and their clients and in their interaction with other legal practitioners is not disclosed to courts because of the various privileges that enable the law to function. Accordingly, legal practitioners must be trusted to do what is right for the proper administration of the law unsupervised. When circumstances

68 Remitter judgment [2021] VSC 666, [122].

lead the court to lack confidence that a practitioner can discharge his paramount duty unsupervised – that a practitioner cannot be trusted – it is no longer possible to consider the practitioner to be a fit and proper person to participate in the administration of justice in a privileged role.

107 I say again that it is important in this context to accept that in Mr Zita's case this question is not being assessed on the basis that he lacks honesty. Rather, the question is more whether he is possessed of sufficient rectitude of character to permit him to be safely accredited to the public as a person who can, without supervision, be entrusted to discharge his obligations to the proper administration of justice. Although honesty, which is a necessary characteristic, is not an issue on this application, for a practitioner to remain on the Roll, the court must be satisfied of their independence, their ability to judge what ethical conduct is required of them and their capacity to act diligently to discharge the responsibilities of their office.

108 I am comfortably satisfied that the findings made in the remitter judgment in respect of Mr Zita's conduct show that he was unfit to work with judges and legal practitioners to ensure that justice is administered with integrity. Simply put, Mr Zita cannot be trusted to be fearlessly independent. He cannot be trusted to put the integrity of the administration of justice above all else, particularly personal or private interests. Plainly, that character trait – his vulnerability to complying with powerful authority figures – demonstrated, and continues to demonstrate, an inability to recognise when independent judgment was, and is, necessary, and an incapacity to recognise when the proper administration of justice was being corrupted and how that consequence might have been, or can be, avoided by proper ethical conduct.

109 Historical assessment of Mr Zita's actions leads inevitably to the conclusion that he was not a fit and proper person to be a legal practitioner. Had his conduct been in pursuit of a dishonest intention to gain a financial advantage at the expense of his clients, there would be little prospect of being able to rationally conclude against the evidence of such sustained dereliction of duty that he could ever be regarded as fit to be entrusted with the privileges of being an officer of the court. However, unlike in

respect of other members of the Bolitho legal team, my findings do not go that far and I do not conclude that my findings mandate that Mr Zita will never into the future be fit to enjoy the privileges associated with a position on the Roll.

110 My finding that Mr Zita is presently unfit to practise because he lacks the character and trustworthiness necessary to discharge the responsibilities of legal practice, would ordinarily require that he be struck off. I do not extend that finding to a conclusion that he is permanently or indefinitely unfit to practise, which opens for consideration the submission put on Mr Zita's behalf that suspension is the appropriate response.[69]

111 The distinction between trust that a responsibility will be discharged and dishonesty as a character trait is well understood. In *Re a Practitioner,* a solicitor had appropriated trust funds to his own use over a period of three and a half years and the court accepted there were circumstances of personal stress.[70] The Full Court was not persuaded that suspension from practice was appropriate. King CJ stated that the proper use for suspension was in those cases where a lawyer has fallen below the high standards expected 'but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner'.[71] A course of fraudulent conduct extending over three years was not such a case.

112 Suspension was the sanction in *The Law Society of the Australian Capital Territory v Gates*, where a lawyer's failure did not involve dishonesty or defalcation but was characterised as 'a persistent and egregious failure to comply with trust account regulations and more importantly to properly deal with trust account funds' that constituted professional misconduct.[72]

113 I have no confidence that a reprimand in addition to what Mr Zita has already suffered would provide adequate protection to the proper administration of justice. Legal

69 *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192, [194] ('***Khosa***').
70 (1984) 36 SASR 590.
71 Ibid 593.
72 [2006] ACTSC 126.

practitioners must appreciate that disloyalty to the proper administration of justice cannot be tolerated. As I noted in the remitter judgment, the maintenance and restoration of public faith and confidence in the administration of justice is foundational and it is not just the responsibility of the courts. General deterrence must be an important purpose when assessing the proper response to Mr Zita's conduct. A suspension can properly carry a significant deterrent consequence with a greater denunciatory effect than a fine or a reprimand.[73] That said, deterrence must always give way to proportion.

114 Suspension may be apt where a practitioner is suffering a temporary ailment and may be fit to practice in a finite time with treatment and supervision.[74] That is because a suspension can support an attempt to reform the practitioner or allow for their rehabilitation, enabling the court to conclude that on termination of the suspension, he will be likely fit to practice.[75]

115 I am comfortably satisfied that Mr Zita is not presently a fit and proper person to remain on the Roll. It is foreseeable that Mr Zita, should he be successful on the path of self-improvement that he has now chosen to pursue, may demonstrate, within a finite time, that he is a fit and proper person to again be granted the privilege of practising law. Assessment of that prospect persuades me that the proper disposition in all the circumstances is to suspend Mr Zita from the Roll, rather than to strike him off.

116 Mr Zita invited me to look carefully into the extent of his insight into and appreciation of the gravity of his conduct, to accept that he has demonstrated effective rehabilitation. He also invited me to accept that he has suffered significant consequences/sanctions in the circumstances that have unfolded, which contributed to both his appreciation of his past conduct and his intentions about how he will in the future conduct himself. I have done so.

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73 *Khosa* [2017] WASCA 192, [194]
74 *Legal Practitioners Conduct Board v Nicholson* (2006) 243 LSJS 293, 297 [37], [38].
75 *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72, 76.

117 I am satisfied that the following matters are pertinent to an assessment of Mr Zita's future prospects. Mr Zita:

(a) has apologised for the harm he has caused and shown insight into his failings in relation to protecting and enhancing the proper administration of justice;[76]

(b) has sought, at least to a limited extent, to study and understand his ethical obligations as a legal practitioner;

(c) will undertake not to become involved in group proceedings or other complex higher court commercial litigation;

(d) has suffered significant ongoing personal psychological distress that has required treatment by health professionals;

(e) faces an enormous financial liability, well beyond his capacity to pay, by reason of the judgment against him, the attitude taken by his professional indemnity insurer, and the legal costs he is expending in connection both with his insurance and the renewal of his practising certificate; and

(f) received considerable ongoing and unflattering media attention during and since the remitter trial in the legal press.

118 While I accept that Mr Zita has some insight into his conduct in the Bolitho proceeding, there are limitations to that insight. What is positively significant is that I am persuaded that since the publication of the remitter judgment Mr Zita feels a genuine remorse for his failings. I am not persuaded that he has fully appreciated the implications of his conduct or the enormity of his breach of the trust that the court placed in him when he was admitted to the Roll. He has more to learn, not just about the responsibilities of lawyers to the administration of justice, but about himself, his limitations and his opportunities to improve. A failure to fully appreciate the gravity of his conduct indicates a lack of continuing fitness to practice because the risk of recurrence of that conduct remains and is inconsistent with the need to protect the

76 Cf *New South Wales Bar Association v Livesey* (1982) 2 NSWLR 231, 233.

community.[77]

119 In part, Mr Zita seeks to avoid the conclusion that he is unfit by promising to retreat to the confined surroundings of his suburban practice. Taking steps to avoid confrontation with circumstances that might challenge his capacity to properly discharge his duties is not the same as having full insight into and an appreciation of what is required of him going forward, but that is what is required before he can resume the practice of law. Limitations or conditions on how Mr Zita might, in the future, practice law are not answers to the questions about his fitness to remain on the Roll. Such issues are best considered in the context of a practitioner's practising certificate.

120 I accept that Mr Zita has features of his personality that contributed to his conduct, in particular the combination of a vulnerability towards compliance with powerful authority figures and a capacity to avoid properly comprehending the circumstances in which he was operating. The psychological assessment confirmed what is otherwise evident from the analysis of his conduct set out in the remitter judgment. In terms of his character, he is deficient in qualities of independent thought and action and the capacity to assess when ethical conduct is required, when his obligations to the proper administration of justice must take precedence over the ordinary conduct of the commercial aspects of his practice as a solicitor.

121 Mr Zita submitted that his conduct was the consequence of the limitations identified by Ms Healy, which could be taken into account in mitigation of the necessary response from the court. I do not find this to be a helpful enquiry because the task is not to assess his moral culpability for his past conduct but rather to identify what implications Ms Healy's assessment has in the assessment of his future fitness. I do not draw from Ms Healy's report that Mr Zita suffers such a significant personality disorder or psychological condition as might diminish the applicability of general deterrence as an objective to be considered to protect the integrity of the

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77 *Law Society of New South Wales v Foreman* (1991) 24 NSWLR 238, 253; *Legal Profession Complaints Committee v in de Braekt* [2013] WASC 124, [35].

administration of justice. There is an important distinction between protecting the public, in the sense of protecting individual members of the public from the consequences of misconduct, and protecting the public interest, by maintaining the integrity of the administration of justice.

122 While Ms Healy's assessment may explain his present circumstances it cannot excuse or diminish the seriousness of his conduct. Ms Healy identified that Mr Zita's character traits contributed to his psychological reaction to the exposure of his conduct and the realisation of the extent of the consequences. She did not assess why he engaged in that conduct. Her assessment confirms the conclusion to be drawn from other factors that he is not presently fit to be entrusted to practice law and it provides a guide as to how Mr Zita might find his way back to being fit and proper to be entrusted with the privileges of being a solicitor.

123 Ms Healy identified that for Mr Zita learning to appreciate the patterns in his personality and identifying and developing the attributes of character that would enable him to be safely accredited as a legal practitioner is an ongoing process. Ms Healy considers that Mr Zita has sufficient skills to achieve this transformation. He has the ability to face his weaknesses and take responsibility for them, a motivation to improve and an 'increasing ability to seek out and listen to expert advice'. He also has her support and that of his friends and colleagues. I accept that Mr Zita's prospects of succeeding in his rehabilitation project in the manner described by Ms Healy are reasonable.

124 What is unclear is precisely what point Mr Zita has reached on this path and when it might be said that he will be able to demonstrate effective rehabilitation. Realistically I cannot presently make this assessment. Ms Healy was not called as a witness and her reference was brief. I can accept that Mr Zita has learned a very significant lesson and that the need for specific deterrence may not be strong. I can also accept that Mr Zita is developing insight and that this process will continue. My best assessment in all of the circumstances is that this process will continue to take time.

125 I consider a period of suspension to be necessary not simply because of the gravity of Mr Zita's dereliction of his duties but also because he must continue his rehabilitation program. The extent to which Mr Zita has travelled down the path of rehabilitation and ought to be entrusted with the responsibilities that come with accreditation as a solicitor becomes a matter for future assessment on completion of a necessary period of suspension. I will return to this question.

126 Mr Zita invited me to accept that the adverse publicity that he received was a significant punishment, a form of public reprimand, because his conduct was portrayed negatively and in association with the far more serious conduct of others on the Bolitho legal team. He also submitted that this publicity was part of the restorative process by which the integrity of the administration of justice is ultimately preserved.

127 I was not persuaded by these submissions. I can accept that the brutal reality of negative publicity for Mr Zita in conjunction with other matters, such as the substantial costs burden of his disputes with the LPLC and the VLSB , was confronting and difficult. It forced him to confront the reality of his conduct in the Bolitho proceeding. However, I was not persuaded that his understanding of the extent of dereliction of his professional obligations and the levels of self-disgust and shame that he personally experienced with that realisation are attributable either to the negative publicity he received during the trial of the remitter or the financial consequences that he faces. The significant ongoing personal psychological distress that he has suffered is attributed by Ms Healy to his appreciation of his failures and the harm that was thereby occasioned to many people, which is to his credit.

128 I do not accept, as Mr Zita submitted, that the negative publicity that he endured contributed to the rehabilitation of the integrity of the administration of justice. While that publicity may have contributed to the objective of general deterrence, it is more likely to have engendered or reinforced negative attitudes towards the integrity of the legal system held by members of the public, which is detrimental to the public interest in the administration of justice. What is beneficial is public reporting of the court's

response to this conduct, including its assessment of whether those involved ought to retain their privileges.

129 Another matter that Mr Zita stressed was the financial consequences that he has suffered. On one view, these financial consequences may be so significant that he may never be able to return to practise as a solicitor, assuming all other requirements for that to occur were satisfied. I accept that the consequences, not just of the judgment but also of the costs of his ongoing disputes is a very substantial threat to his ongoing personal financial viability which, on any view, is a substantial personal detriment. That said, these consequences would more appropriately be influential when considering a fine or a reprimanded and are of limited relevance to the public protective aim to be achieved through suspension or striking off. That said, I have taken those consequences into account.[78]

130 In all the circumstances I am prepared to accept that the exercise of the protective jurisdiction does not require that Mr Zita be removed from the Roll so that he cannot repeat his conduct. His conduct amounted to a gross dereliction of his obligations to the administration of justice but the circumstances in which he fell short of his professional obligations does not compel the consequence that he should be struck off. That said, the exercise of that jurisdiction does require that he be suspended from the Roll.

131 Synthesising all of the relevant considerations that have been put to me, I am satisfied that I should suspend Mr Zita from the Roll until 30 June 2024.

132 As noted above, there remains a question of how an assessment is to be made as to whether and when Mr Zita is fit to return to practice. If he were struck off, Mr Zita would need at some future date to attempt to persuade the Victorian Legal Admissions Board that he was a fit and proper person to be readmitted to the profession. If he is suspended from the Roll, on completion of his period of suspension, he is eligible to resume practice but to do so must comply with the

78 Cf *Pickering v Auckland District Law Society* [1985] 1 NZLR 1, 5; *Re Maidment* (1992) 23 ATR 629, 652-3.

statutory requirements.

133 In June 2019, Mr Zita gave notice to the VLSB of the allegations against him in the remitter proceeding. The Board did not make any decision on Mr Zita's application to renew his practising certificate for the financial year ending 2019, until 28 January 2022, when it determined not to renew his practising certificate and declared that he was ineligible to apply for a new practising certificate prior to 2026. I do not know what information was before the Board when it so determined, save that it was clearly based on my published findings. There may be good grounds supporting that decision that have not been put before me.

134 Mr Zita commenced proceedings in VCAT questioning the validity of the Board's actions. A procedural contest ensued and on 15 February 2022, VCAT stayed the Board's 28 January 2022 decision until the earlier of:

> (a) any order being made by the Supreme Court of Victoria removing the applicant from the Roll of Practitioners or to suspend or otherwise prevent the applicant from practising;
>
> (b) the hearing in determination of this proceeding; or
>
> (c) further order.

135 Read literally, it would appear that the stay will lift on pronouncement of my order giving rise to the prospect that Mr Zita may not be able to recommence practice until after 2025, although that consequence would appear to be subject to the resolution of further extant, or possible, proceedings in respect of the Board's decision.

136 I do not have jurisdiction in respect of practising certificates. The ultimate consequence of the VLSB's January 2022 decision remains to be resolved by others. The consequences of my orders will be that Mr Zita will be disentitled from practising as a solicitor until 30 June 2024. Becoming a 'disqualified person' under one or more of the limbs of the definition in s 6 of the *Legal Profession Uniform Law* will effectively end his capacity to be associated with Portfolio Law Pty Ltd. As counsel agreed during submissions, the issue of a future practising certificate will need to be resolved.

137 For my part, because the Board cannot issue a practising certificate after 1 July 2024

unless it is satisfied that Mr Zita is a fit and proper person, the opportunity for a timely assessment of that issue before any opportunity is granted to him to resume practice will fall to the Board. Given the role of the Commissioner as Contradictor and the prior involvement of the VLSB, I have concluded that, after he serves the suspension that I will order, the VSLB rather than the Legal Admissions Board can assess Mr Zita's fitness to practice in the context of practising certificate renewal under the *Legal Profession Uniform Law*.

Order

138 I will order that the registration of Anthony Zita on the Roll of Australian lawyers maintained by the court is forthwith suspended until 30 June 2024 and that he not engage in legal practice until after 1 July 2024, subject to first satisfying the requirements of the *Legal Profession Uniform Law*.

CERTIFICATE

I certify that this and the 44 preceding pages are a true copy of the reasons for judgment of Justice John Dixon of the Supreme Court of Victoria delivered on 24 June 2022.

DATED this 24th day of June 2022.

SUPREME COURT OF VICTORIA
Associate of a Judge of the Court

Associate